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OCWEN LOAN SERVICING, LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

MERCEDES HERRERA,

Plaintiff,

v.

LCS FINANCIAL SERVICES CORPORATION and OCWEN LOAN SERVICING LLC,

Defendants.

Case No. C09-02843 TEH

DEFENDANT OCWEN LOAN SERVICING, LLC'S OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL FURTHER DISCOVERY RESPONSES

Hearing Date: August 4, 2010
Time: 9:30 a.m.
Courtroom: F
Judge: Hon. James Larson

[Declaration of Chomie Neil filed concurrently herewith]

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INTRODUCTION

Plaintiff's motion to compel asks this Court to order defendant Ocwen Loan Servicing, LLC ("Ocwen") to provide information that, in various combinations:

- Ocwen does not have;
- consists of highly confidential, personal financial information of third-parties that is subject to federal and state privacy protections;
- is entirely irrelevant to the issue of class certification (which is the only discovery the Court has authorized); and
- Ocwen has already provided.

As explained more fully below, Ocwen has responded to plaintiff's voluminous and burdensome discovery requests in the most reasonable and complete way possible, consistent with its obligations under the Federal Rules of Civil Procedure and the Court's prior orders pertaining to discovery. Ocwen has also fully engaged in a meet and confer process with plaintiff, providing supplemental responses in some instances — and in others, providing a clear rationale for its literal inability to provide the information that plaintiff seeks. Because plaintiff has articulated no sound basis for compelling further responses to her oppressive discovery requests, her motion to compel should be denied in its entirety, as set forth more fully below.

RELEVANT FACTUAL BACKGROUND

Plaintiff's Default and Communications From Ocwen. Plaintiff alleges that she purchased a condominium in Fremont, California in late 2005, using the proceeds of two mortgage loans she obtained from New Century Mortgage Corporation. (Am. Compl., Dkt. No. 16, at ¶¶ 8-9.) As plaintiff admits, Ocwen did not originate plaintiff's loan; rather, Ocwen is the mortgage servicer that acquired the servicing rights to Ms. Herrera's second mortgage in February 2006. (Am. Compl. ¶¶ 9, 11; July 14, 2010 Declaration of Chomie Neil ("Neil Decl.") filed concurrently herewith, ¶¶ 2, 10.) As servicer, Ocwen issued billing statements and collected payments on behalf of the investor-owner of plaintiff's second mortgage.

Plaintiff fell significantly behind on her mortgage payments and eventually lost title through a non-judicial foreclosure by the first mortgage holder on June 19, 2008. (Am. Compl. at ¶ 8.) (Ocwen was not the servicer of Ms. Herrera's first mortgage loan that foreclosed — only the second mortgage loan.) In a letter dated July 1, 2008, less than two weeks after the first lien holder's foreclosure (and ***not*** five months after the foreclosure, as plaintiff's motion to compel erroneously asserts), Ocwen notified plaintiff that she was in default of the terms of her second mortgage note. (Ex. A to Am. Compl.) Ocwen subsequently sent plaintiff an account statement dated July 17, 2008, listing the total amount owing by plaintiff. (Ex. B to Am. Compl.) Plaintiff did not respond to either communication. Shortly afterwards, Ocwen was directed by the owner-investor of plaintiff's loan that the servicing rights of that loan were being transferred to co-defendant LCS Financial Services Corp. ("LCS"). (Neil Decl. ¶ 10.) Ocwen was directed to transfer servicing of the loan to LCS, and Ocwen sent a letter notifying plaintiff that LCS would begin servicing her loan. (*Id.*; Ex. D to Am. Compl.)

Ocwen's Data And Records. Ocwen acquires servicing rights to mortgage loans, in some cases directly from the originator, but in many cases from an assignee other than the originator. (Neil Decl. ¶ 2.) In connection with this process, Ocwen is provided with certain information about the loan to enable it to receive payments and apply those payments properly to the loan. This information typically includes the loan balance, borrower name, and next payment due date, as well as related information (such as the interest rate, as well as tax and insurance related information). (*Id.* ¶ 3.) This data is transferred electronically and is maintained in Ocwen's internal loan servicing system. (*Id.*) Ocwen also receives copies of the note and mortgage from the originators or the loan assignees, as well as other documents that may include loan modification agreements, title insurance policies, and correspondence. (*Id.* ¶ 4.) In connection with an originator or assignee's transfer of loan information and loan files to Ocwen for servicing, Ocwen frequently requests that the transferring entity provide Ocwen with any available information about whether each loan is a purchase money mortgage or a refinancing

transaction, but in a vast majority of cases, Ocwen is ***not*** provided with data regarding whether a loan is a refinancing transaction or a purchase money mortgage. (*Id.* ¶ 3.) Though Ocwen does have such data for a handful of loans secured by real property in Texas, it does not posses such data for loans secured by property in California. (*Id.*)

In some instances, the loan files Ocwen receives may include the mortgagor's loan application (as was the case with plaintiff's loan file). (*Id.* ¶ 4.) Loan applications may indicate whether the mortgagor claimed that the loan was for the purchase of her home or for a refinance transaction. (*See id.* ¶ 8.) However, Ocwen does not have the ability to search these documents via an automated electronic process. (*Id.* ¶¶ 6-7.) Certain documents, such as the note, mortgage and loan application may be "tagged" as part of the process of scanning documents into its electronic databases, and for such documents, Ocwen is able to determine whether they are likely to exist in a particular electronic file (though this does not account for errors in the tagging process). (*Id.* ¶ 6.) Thus, in order to determine whether any particular loan file secured by a property in California definitively includes a loan application, and to ascertain the content of that application, including whether the mortgagor indicated her loan was for a purchase money mortgage or refinance transaction, Ocwen would need to undertake a file-by-file review of each potential such loan in Ocwen's servicing portfolio. (*Id.* ¶¶ 6-8.) Because Ocwen does not have a borrower's loan applications in each of its files, such a loan-by-loan review would not completely or accurately identify borrowers whose mortgages were for the purchase of their home.

After receiving either electronic or hard-copy versions of loan related documents from originators or loan assignees, Ocwen maintains the hard-copy documents in offsite storage; in its ordinary course of business, Ocwen refers only to its electronic data when servicing loans. (*Id.* ¶ 5.) The electronic copies of these documents are not text searchable, *id.* ¶ 6, and therefore cannot be analyzed within a database. In order definitively ascertain what documents are in these files and to analyze the content of those documents, the files and documents must be reviewed individually; Ocwen is not aware of

any software-based or automated process to conduct aggregate analyses on the content of these files and documents. (*Id.* ¶¶ 6, 8.)

The Present Lawsuit. On or about June 25, 2009, plaintiff filed a complaint against Ocwen and LCS, alleging that Ocwen violated California's Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code § 1788 *et seq.* (the "Rosenthal FDCPA") by requesting payment on her defaulted second mortgage loan following the foreclosure as to the first lien. (Compl., Dkt. No. 1.) This theory was rejected by the Court. (*See* Dkt. No. 15.) After her original complaint was dismissed, plaintiff filed an amended complaint alleging that Ocwen's communications to plaintiff following foreclosure on her first mortgage were misleading and otherwise unlawful because they failed to inform plaintiff that pursuant to California's anti-deficiency statute, Cal. Civ. Code § 580b ("Section 580b"), no deficiency judgment could be taken against plaintiff following the foreclosure on plaintiff's property, and because these communications improperly implied that failure to make payment "would result in legal consequences" for plaintiff even though no deficiency judgment was possible against plaintiff. (Am. Compl., ¶¶ 14-18.)[1] Based on these allegations, plaintiff seeks to represent a class consisting of all California residents (a) who took out a loan "subject to" Section 580b, where (b) the real property secured by the loan was sold in foreclosure, and (c) Ocwen sought to collect on the loan following the foreclosure "in a manner which violated the Fair Debt Collections Practices Act, and therefore violated" the Rosenthal FDCPA.

Plaintiff's Disputed Discovery Requests. On February 22, 2010, the Court ordered that discovery would be limited to issues pertaining to class certification. (Dkt. No. 47.) On this same day, plaintiff served voluminous discovery requests seeking information that was not only irrelevant to class certification — such as Ocwen's net worth — but also seeking information that has no bearing on plaintiff's claims against

[1] Contrary to plaintiff's assertion, Ocwen ***does not*** concede that Section 580b applies to plaintiff's second mortgage. Rather, Ocwen assumed that the statute applied for the limited purpose of its motion to dismiss plaintiff's original and amended complaints.

Ocwen, such as information concerning the entire payment history associated with absent putative class members' loans. (*See* Pl.'s Interrog. Nos. 1, 8.) Ocwen responded to plaintiff's requests to the extent possible and participated in a lengthy meet and confer process over several weeks in an attempt to reach a reasonable compromise with plaintiff, including by supplementing several responses. However, with respect to certain requests, no agreement could be reached. As set forth below, plaintiff's motion to compel further responses to such requests should be denied in its entirety, for numerous reasons.

ARGUMENT

I. PLAINTIFF'S MOTION TO COMPEL FURTHER RESPONSES TO INTERROGATORIES 1-7 SHOULD BE DENIED FOR NUMEROUS REASONS.

> **Interrogatory 1**:[2] For each purchase money mortgage loan that you have attempted, since June 25, 2008, to collect on after the property securing the loan was foreclosed upon, please identify (a) the name of the borrower, (b) the loan number or other identifying number, (c) the current repayment status, (d) the payment history, (e) the date of foreclosure, and (f) the amount of money you collected if any, after foreclosure.
>
> **Interrogatory 2**: For each purchase money mortgage loan that, , [sic] since June 25, 2008, you assigned, sold, or transferred to a third party debt collector (including defendant LCS) after the property securing the loan was foreclosed upon, please identify (a) the borrower, (b) the loan number or other identifying number, (c) the date of sale, assign, or transfer, (d) the third party debt collector, (e) the date of foreclosure, (f) whether you notified the third party debt collector that § 580b applied to the loan, (g) if so, the date you notified the third party debt collector, and (h) the amount of money you have received in connection with each loan, if any, from the third party debt collector since the loan was assigned, sold, or transferred.
>
> **Interrogatory 3**: For each loan identified in response to interrogatories 1 and 2, please state when and how you became aware that the property securing the loan had been foreclosed on.
>
> **Interrogatory 4**: For each loan identified in response to interrogatories 1 and 2, please identify by case or other

[2] Plaintiff's recitation of Ocwen's responses to plaintiff's interrogatories and requests for production, including for Interrogatories 1-2, 4-7, 10 and Requests for Production 13-14, contain errors. Ocwen's actual responses, which contain the correct text, are attached as Exs. 3-5 to plaintiff's motion.

> number, date of filing, and type (i.e. civil complaint, notice of lien, acceleration, notice of default) all legal process initiated by you after the date the property securing the loan was foreclosed upon.
>
> **Interrogatory 5**: For each loan identified in response to interrogatory 1, please describe how your efforts to collect on that loan changed following the foreclosure on the property securing the loan.
>
> **Interrogatory 6**: For each loan identified in response to interrogatory 1, please describe each method used by you to attempt to collect on the loan after the property securing the loan was foreclosed on.
>
> **Interrogatory 7**: For each loan identified in response to interrogatories 1 and 2, please state whether you contend that the borrower on the loan received any notice from you that no deficiency judgment could be obtained with respect to the loan.

Plaintiff's request to compel Ocwen to provide further responses to Interrogatories 1-7 should be denied, first, because each is predicated on Ocwen's ability to identify whether particular loans in its servicing portfolio are "subject to" Section 580b — an ability that Ocwen simply does not have. Further, even if Ocwen could identify such loans, plaintiff's motion to compel should nonetheless be denied for the additional reason that these interrogatories are not only overbroad and burdensome, they also seek highly sensitive and confidential financial information about third parties that is subject to federal and state privacy laws, on the one hand, and entirely irrelevant to the issue of class certification, on the other.

A. The Information Sought by Plaintiff's Interrogatories 1-7 is Not Reasonably Available to Ocwen.

Plaintiff herself concedes that in order to respond to Interrogatories 1-7, Ocwen needs to be able to determine whether the loans are "subject to" Section 580b. (Pl.'s Mot. at 9-10.) Plaintiff further concedes that in order to make the legal judgment as to whether a loan could be "subject to" Section 580b, one must determine whether the loan proceeds at issue were used to finance the purchase of the home or were instead obtained as part of a refinance transaction. (*Id.*) But as explained above, Ocwen does not

possess the data necessary to definitively determine whether the loans it services are associated with purchase money mortgages or whether they are associated with refinance transactions.

Plaintiff's contention that Ocwen "appears to have this information" is misleading, at best. (Pl.'s Mot. at 4:9-16.) Plaintiff suggests that Ocwen possesses such information because it was able to obtain a copy of plaintiff's own loan file. But, to be clear, Ocwen was able to search for and provide a comments log and transaction history for plaintiff's loan because Ocwen had plaintiff's name and address by virtue of the complaint she filed in this action. (*See, e.g.*, Ex. A to Am. Compl.) In other words: Ocwen knew where to look. But with respect to information for other unspecified borrowers, Ocwen does not have a field in its database that enables it to identify which loan files are purchase money mortgages "subject to" Section 580b. (Neil Decl. ¶ 3.) And while Ocwen does have some information regarding whether a loan file includes a loan application, in order to definitively determine whether a particular loan file secured by a property in California includes a loan application, and to ascertain whether in the application the borrower claimed that she intended to use her funds for the purchase of a home as opposed to a refinance, Ocwen would need to undertake a file-by-file review. (*Id.* ¶¶ 6-8.) Even so, the search would not completely or accurately identify borrowers whose mortgages were for the purchase of their homes because more than 13% of its California loan files do not even contain loan applications. (*Id.* ¶ 6.)

In circumstances like those present here, where it is not possible to ascertain the identity of the putative members of the class because Ocwen does not have the information necessary to determine which loans in its servicing portfolios meet the criteria of plaintiff's proposed class definition, courts have repeatedly refused to grant class certification rather than require defendants to search their records in vain for information that does not exist or would require a file-by-file review to obtain. *See Sadler v. Midland Credit Mgmt., Inc.*, Case No. 06 C 5045, 2008 U.S. Dist. LEXIS 51198, *15-*19 (N.D. Ill. July 3, 2008) (class certification denied because "certain information necessary to

determine whether an individual is part of the class" was not in defendant's files at all and identifying even partially useful information would "require an exhaustive, individualized inquiry") (quotations, citations omitted); *In re Wal-Mart Stores, Inc. Wage & Hour Litig.*, No. C 06-2069 SBA, 2008 U.S. Dist. LEXIS 14756, *24-*26 (N.D. Cal. Feb. 13, 2008) (class certification denied where information necessary to ascertain whether person putative class member was "not contained in any of the electronic databases at issue, but [could] only be determined by an individual review of each potential class member's personnel file" and where some information was not available at all); *Deitz v. Comcast Corp.*, No. C 06-06352 WHA, 2007 U.S. Dist. LEXIS 53188, *25-*26 (N.D. Cal. July 11, 2007) (class certification denied where plaintiff proposed a class of persons who, *inter alia*, had "cable-ready television set(s) or a video cassette or DVD recorder or player" because "[i]t would be impossible to determine without significant inquiry which [putative class members] owned such devices"); *Kirkman v. N. Carolina R.R. Co.*, 220 F.R.D. 49, 53 (M.D.N.C. 2004) (certification denied even though court "would eventually be able to ascertain potential class members through detailed title searches" because such a procedure would not be administratively feasible).

For the same reasons that class certification was denied in the preceding cases, there is no basis here to compel Ocwen to engage in the costly and likely futile review of its files and databases for information demanded by plaintiff. Plaintiff "acknowledges that Ocwen may not possess complete information" but absurdly urges the Court to order Ocwen to provide information for loans unless Ocwen is "sure the loan does not belong to a potential class member." (Pl.'s Mot. at 10:13-16, 14:19-24.) In other words, plaintiff asks the Court to compel Ocwen to produce information that is admittedly overbroad and irrelevant, including information concerning borrowers who are, by definition, not members of the putative class. But neither the Rules of Civil Procedure nor the Court's civil minutes require Ocwen to search its records and produce information that is irrelevant to class certification or to any issue in the case, nor do they require Ocwen to violate the privacy rights of absent individuals.

B. Any Benefit Of Compelling Ocwen To Provide Further Responses Is Far Outweighed By The Burdens To Ocwen.

Any supposed benefit of compelling Ocwen to further respond to Interrogatories 1-7 is far outweighed by the burden that would be associated with doing so, particularly given the grossly overbroad nature of these requests and the utter irrelevance of the information sought. *See* Fed. R. Civ. P. 26(b)(2)(C)(iii). Putting aside that Ocwen cannot reasonably ascertain which loans are purchase money loans and that the discovery rules should not require it to make a legal judgment as to which loans are "subject to" Section 580b in order to comply with its discovery obligations, these disputed interrogatories have no reasonable bearing on plaintiff's claims or on the issues associated with class certification.

For example, Interrogatories 1 and 2 seek borrower names, loan numbers, current loan repayment status, loan payment history, the date of loan foreclosure, the amount of money collected by Ocwen since the foreclosure on their loan, among other information (*see* Pl.'s Proposed Order at 2 (further requesting borrower and property address information), Pl.'s Interrogs. 1-7, Pl.'s Ex. 1 at 2-4). But whether an absent individual's payments were timely in a particular month has no relevance whatsoever to plaintiff's claims or the issue of class certification. Moreover, courts have repeatedly refused to compel the production of exactly this kind of information prior to the certification of a class. *Palmer v. Stassinos*, Case No. 5:04-cv-3026 RMW (RS), 2005 U.S. Dist. LEXIS 41270, *10-*11 (N.D. Cal. May 18, 2005) (refusing to compel further information regarding putative class members in an action alleging violation of the FDCPA, including the putative class members' name, address, and amount for dishonored checks which defendant attempted to collect); *see also Bird v. Hotel Corp., v. Super 8 Motels, Inc.*, No. CIV. 06-4073, 2007 U.S. Dist. LEXIS 7513, *8-*10 (D.S.D. Feb. 1, 2007) (refusing to compel production of the "name, current address, current telephone number, franchise address, and franchise telephone number for each franchisee that has ever operated under the same or essentially similar franchise agreement" because such

information is "not helpful or necessary to establish or decide certification of the class"); *Robbins v. NCO Financial Sys., Inc.*, NO. 2:06 cv 116, 2006 U.S. Dist. LEXIS 89962, *13-*15 (N.D. Ind. Dec. 12, 2006) (refusing to compel production of putative class members' names, addresses, and complete file pre-certification because such information was not necessary to resolving class certification in an action alleging violations of the FDCPA); *Dziennik v. Sealift, Inc.*, No. 05-CV-4659 (DLI) MDG), 2006 U.S. Dist. LEXIS 33011, *3 (E.D.N.Y. May 23, 2006) ("Courts have ordinarily refused to allow discovery of class members' identities at the pre-certification stage").

Plaintiff contends that the payment history and other information sought by Interrogatories 1 and 2 would be relevant to the issue of "damages," arguing that her damages will depend "in part on the number and frequency of Ocwen's" purportedly unlawful debt collection practices. (Pl.'s Mot. at 4:19-21). However, under applicable FDCPA jurisprudence, it is the frequency of unlawful attempts to collect against plaintiff that matter, and not those against persons who may not even be members of the putative class. *See* 15 U.S.C. 1692k(b)(1); *Cusamano v. NRB, Inc.*, No. 96 C 6876, 1998 U.S. Dist. LEXIS 15418, at *7-*8 (information with respect to frequency of unlawful collection attempts not relevant to determination of damages with respect to plaintiff).

Plaintiff asserts that the information sought by Interrogatories 2-7—such as when Ocwen became aware that a property subject to Section 580b was foreclosed upon, whether legal processes were initiated against a loan subject to Section 580b, how Ocwen's collection methods changed following the foreclosure of a loan subjection to Section 580b, or whether Ocwen notified borrowers that no deficiency judgments could be obtained on loans subject to Section 580b — is relevant to Ocwen's affirmative defenses, liability, and the determination of damages. (Pl.'s Mot. at 4-9.) But Ocwen has already agreed to provide responsive information and documents that evidence its policies and procedures as to these issues. (*See* Pl.'s Ex. 3, Ocwen's Responses to Pl.'s Interrogs. 9-10 and Pl.'s Ex. 4, Ocwen's Responses to Pl.'s Requests for Production Nos. 7, 9, 16.) Ocwen should not be compelled to produce individual loan-by-loan information to

evidence such policies and procedures. Plaintiff's request that Ocwen "describe" various occurrences on a loan-by-loan with respect to the loans of potentially hundreds, if not thousands, of absent individuals (whose identity cannot be reliably determined as discussed above) is the very essence of abusive discovery.

For this same reason, courts repeatedly decline to grant discovery where complying with the requests would require file-by-file review of thousands of files, even in cases where accurate and full responses to plaintiff's requests could eventually be obtained. *Munoz-Santana v. U.S. Immigration and Naturalization Serv.*, 742 F.2d 561, (9th Cir. 1984) (holding that district court abused its discretion when it required defendant to manually or electronically search filing system where the review expenses were significant and benefits were small); *Coleman v. Am. Red Cross*, 23 F.3d 1091, 1098 (6th Cir. 1994) (no abuse of discretion where court declined to compel party to search every file in its headquarters for relevant documents); *Ricotta v. Allstate Ins. Co.*, 211 F.R.D. 622, 624 (S.D. Cal. 2002) (refusing to compel discovery that would require defendant to examine 50,000 claims files); *Marker v. Union Fidelity Life Ins. Co.*, 135 F.R.D. 121, 124-25 (M.D.N.C. 1989) (refusing to require party to produce litigation histories, though marginally relevant, where new software would need to be developed to identify the relevant claim files and each claim file would have to be retrieved and reviewed). Here, the same result should obtain, particularly where any file-by-file review is not likely to yield a completely accurate result.

In such circumstances, the burdens clearly outweigh any benefit to plaintiff.[3] Contrary to plaintiff's suggestion, this analysis is not changed by the fact that Ocwen has the financial wherewithal to conduct the requested reviews. "[T]he proper test is not whether one's opponent has the ability to pay, but whether the cost is substantial *vel non* . . . The fact that defendant is a large company and plaintiff is a person of modest means

[3] The authorities cited by plaintiff do not dictate a different result. *Kolzlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73 (D. Mass. 1976) is unpersuasive because, in that case, the defendant had already provided -- in another context -- similar discovery responses to those plaintiff sought to compel. *Id.* at 76.

is not a decisive factor in resolving discovery disputes. The Court does its duty by heeding the admonition to act 'in an evenhanded manner that will prevent use of discovery to wage a war of attrition as a device to coerce a party, whether financial weak or affluent.'" *Marker*, 125 F.R.D. at 124-125 (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 98 S.Ct. 2380, 57 L. Ed. 2d 253 (1978) and Fed. R. Civ. P. 26(b)(1) 1983 advisory committee's note).

C. Providing Names, Payment Histories, and Other Loan Information Relating to Absent Individuals, Especially Those Who May Not Be Putative Class Members, Would Result in Severe Privacy Violations.

It is not merely Ocwen's interests that are at stake via this motion; it is also the privacy rights of absent individuals who may have no interest in having their names, addresses and personal financial information concerning the details of their defaulted home mortgage loans and ultimate foreclosures shared with plaintiff's counsel — particularly where such absent individuals are not even members of plaintiff's proposed class and are not owed any fiduciary duty by plaintiff's counsel. As set forth below, the Court need not compel Ocwen to produce such information which is protected by both state and federal privacy laws.

Personally identifiable financial information such as "information a consumer provides on a loan application, account balance information, payment history, overdraft history, the fact that an individual has been or is a client of the financial institution, any information about a consumer if it is disclosed in a manner to indicate that the individual is or has been a consumer of the financial institution" is subject to the privacy protections afforded under the Gramm-Leach-Bliley Act ("GLBA"). 15 U.S.C. § 6801; *Landry v. Union Planters Corp.*, No. 02-3617 Section "C" (3), 2003 U.S. Dist. LEXIS 10553, *14-*16 (E.D.La. June 9, 2003) (citing 15 U.S.C. § 6809(4)(A) and 16 C.F.R. § 313.3(o)(1)(i)(iii) and 313.3(o)(2)(i)). This is exactly the kind of information that plaintiff seeks in her interrogatories, and exactly the kind of information that courts have refused to compel financial institutions to disclose. *Landry*, 2003 U.S. Dist. LEXIS 10553, *8-*10, *18, *22 (declining to require defendant mortgage company to produce

notes and loan agreements because "personal identification data such as names, addresses, and phone numbers[] has no bearing on the merits of class certification issues").

The sensitive financial information plaintiff demands is also subject to the privacy protections afforded under the article I, section 1 of the California constitution. *See Whittall v. Henry Schein, Inc.*, No. CIV S-05-1629 WBS GGH, 2006 U.S. Dist. LEXIS 96622, *10-*11 (E.D. Cal. Apr. 5, 2006) (refusing to allow discovery into the payment records of absent individuals) (citations omitted); *Valley Bank of Nevada v. Superior Court of San Joaquin County*, 15 Cal. 3d 652, 656-57 (Cal. 1975) (even where relevant and available, information shared with bank is subject to heightened expectations of privacy).[4]

To the extent plaintiff contends that she requires this information in order to identify putative class members, courts have repeatedly rejected this argument and held that such discovery is not available pre-class certification. *See, e.g., Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 416 (9th Cir. 1985) (affirming denial of motion to produce names of similarly situated investors to support plaintiff's class certification motion); *Dziennik v. Sealift, Inc.*, No. 05-CV-4659 (DLI) (MDG), 2006 U.S. Dist. LEXIS 33011, *3 (E.D.N.Y. May 23, 2006) (refusing to allow discovery of class members' identities at the pre-certification stage); *Palmer*, 2005 U.S. Dist. LEXIS 41270, at *12-*13 (same). Plaintiff's further contention that the April 20, 2010 protective order adequately protects the privacy interests of absent individuals is unavailing. While the protective order is intended to safeguard Ocwen and plaintiff's confidential information, it does not, for example, limit Ocwen's liability for sharing the confidential private information of its customers with plaintiff's counsel, nor would it prevent plaintiff's counsel from contacting individuals about whom it received private, financial information. *Whittall*, 2006 U.S. Dist. LEXIS 96622, *13 n.5 ("The court recognizes that a protective order is in place to prohibit

[4] Neither *Khalilpour v. CELLCO Partnership*, No. C 09-02712 CW (MEJ), 2010 WL 1267749 (N.D. Cal. Apr. 1, 2010) nor *Belaire-West Landscape, Inc. v. Superior Court of Los Angeles County*, 149 Cal. App. 4th 554 (2007), cited by plaintiff, implicated the disclosure of financial information.

widespread dissemination of the requested information. Nevertheless, the mere existence of a protective order does not automatically trump privacy privileges"). (*See* Dkt. No. 49.) Plaintiff has provided no reason for this Court to disregard the privacy rights of numerous individuals, as would be required by granting plaintiff's motion.

For the above reasons, plaintiff's motion to compel further responses to Interrogatories 1 - 7 should be denied.

II. THE FURTHER INFORMATION PLAINTIFF SEEKS IN RESPONSE TO INTERROGATORIES 9 AND 10 IS OVERBROAD AND CUMULATIVE.

> **Interrogatory 9**: Please identify by name, job title, dates of employment, last known address, and phone number all the people involved in creating each procedure you have had in effect since June 25, 2008, in connection with California Code of Civil Procedure § 580b.
>
> **Interrogatory 10**: Please identify by name, job title, dates of employment, last known address, and phone number all the people with knowledge of facts supporting each of your affirmative defenses.

In response to Interrogatories 9 and 10, Ocwen has already agreed to produce the policies and procedures evidencing its affirmative defenses, including policies relating to its bona fide error defense, and has also agreed to designate corporate witnesses under Rule 30(b)(6) as appropriate to testify about its policies, procedures and affirmative defenses. (*See* Pl.'s Ex. 8.) This information is more than sufficient to allow plaintiff to "test Ocwen's defenses and to depose witnesses with relevant knowledge," which is plaintiff's stated rationale for demanding further responses to the above, overbroad interrogatories. (*See* Pl.'s Mot. at 16:1-12.) Plaintiff's demand for the identities of "***all*** the people involved" in creating its policies and "***all*** the people with knowledge" of Ocwen's affirmative defenses is thus unnecessarily cumulative, and not within the scope of permissible discovery. *See* Fed. R. Civ. P. 26(b)(2)(C)(ii); *Negotiated Data Solutions, LLC v. Dell, Inc.*, No. C09-80012FMISC JF (HRL), 2009 U.S. Dist. LEXIS 25026, at *11 (N.D. Cal. Mar. 17, 2009) (quashing deposition subpoena where third party had produced responsive documents because the deposition would be cumulative and served only to confirm the previous production); *Beinin v. Ctr. for the Study of Popular Culture*, No. C

06-2298 JW (RS), 2007 U.S. Dist. LEXIS 22518, at *11 (N.D. Cal. Mar. 16, 2007) (denying motion to compel information redacted from emails because the information was "cumulative at best."). Given, Ocwen's prior responses to these interrogatories, which clearly demonstrate that Ocwen is committed to providing plaintiff with appropriate, substantive discovery as to both its policies and procedures as well as its affirmative defenses, plaintiff's motion to compel should be denied.

III. NO FURTHER RESPONSE IS REQUIRED TO PLAINTIFF'S REQUESTS FOR PRODUCTION RELATING TO COMMUNICATIONS BETWEEN OCWEN AND LCS.

> **Request for Production 5**: All documents and ESI exchanged between you and defendant LCS that relate to Mercedes Herrera, including those that relate to her foreclosure, her loan, the assignment of her loan by you to LCS, and to this lawsuit.
>
> **Request for Production 6**: A copy of all contracts in effect between you and defendant LCS from the time Mercedes Herrera's loan was assigned by you to LCS to the time this lawsuit was filed.

In response to Request for Production 5, which seeks documents and information exchanged between Ocwen and LCS that relate to plaintiff, Ocwen has agreed to conduct a good faith inquiry into any data fields that may have been transmitted between Ocwen and LCS in connection with the investor-owner's transfer of the loan to LCS. (*See* Pl.'s Ex. 11.) With respect to Request for Production 6, which seeks any contract in effect between LCS and Ocwen from the time that plaintiff's loan was "assigned" by Ocwen to LCS to the time the lawsuit was filed, Ocwen did not "assign" any loan to LCS—the loan was transferred by the investor-owner from Ocwen to LCS. More importantly, as repeatedly explained to plaintiff, no contract exists between LCS and Ocwen during the relevant period. (Neil. Decl. ¶ 10.) Accordingly, Ocwen has agreed to provide the documents in its possession, custody, or control responsive to plaintiff's requests; no further response is required. *See, e.g.*, *Chatman v. Felker*, No. CIV S-03-2415 JAM KJM P, 2009 U.S. Dist. LEXIS 4747, at *7 (E.D. Cal. Jan 23, 2009) (defendant's response that "[a]fter a reasonable search and diligent inquiry, Responding

Party does not have information responsive to this request" sufficient).[5] Plaintiff's request to compel further responses to Requests 5 and 6 should therefore be denied.

IV. OCWEN HAS ALREADY PROVIDED FULL RESPONSES TO PLAINTIFF'S REQUESTS FOR PRODUCTION 13 AND 14.

> **Request for Production 13**: All documents and ESI that reflect borrowers contacting you regarding California Code of Civil Procedure § 580b since June 25, 2008, including the communications themselves.
>
> **Request for Production 14**: All documents and ESI that reflect persons or entities other than borrowers contacting you regarding California Code of Civil Procedure § 580b since June 25, 2008, including the communications themselves.

In response to Requests for Production 13 and 14, Ocwen has already produced documents that reflect borrowers or entities contacting Ocwen regarding Section 580b since June 25, 2008 that Ocwen could locate after a reasonable and diligent search. Ocwen searched for communications from borrowers or other entities relating to Section 580b in the files of Ocwen's Office of the Ombudsperson, the location where Ocwen maintains its files relating to escalated customer service issues (Neil Decl. ¶ 11) — in other words, Ocwen searched those repositories where the documents are likely to be. Nothing more is required of Ocwen under the Federal Rules of Civil Procedure. *See, e.g.*, *Hsieh v. Nicholson*, No. C06-5281 PJH (BZ), 2007 WL 2438315 (N.D. Cal. Aug. 23, 2007) (denying motion to compel based on showing that defendant conducted a reasonable search and inquiry); *Memry Corp. v. Kentucky Oil Techs.*, No. C04-03843, 2007 WL 832937 (N.D. Cal. Mar. 19, 2007) (plaintiff's independent examination of hard drive mirror image not required after defendant's reasonable search for responsive documents); *Sedona Corp. v. Open Solutions, Inc.*, 249 F.R.D. 19 (D. Conn. 2008)

[5] Plaintiff's requests are also not suitable for a motion to compel because they seek information that is irrelevant to her claims and Ocwen's defenses. *See Cusamano v. NRB, Inc.*, No. 96 C 6876, 1998 U.S. Dist. LEXIS 15418 (N.D. Ill. Sept. 23, 1998) (finding that evidence relating of administrative actions by third parties and defendant's actions with respect others consumers was irrelevant to plaintiff's claims and the applicability of defendant's bona fide error defense with respect to plaintiff). Communications between Ocwen and LCS likewise do not make class certification under Rule 23 more or less likely. *See* Fed. R. Civ. P. 23.

(broader search unnecessary where original search was restricted to emails for employees involved in the project at issue). Plaintiff's dissatisfaction with the production is insufficient justification for a motion to compel. *See, e.g.*, *Chatman v. Felker*, No. CIV S-03-2415 JAM KJM P, 2009 U.S. Dist. LEXIS 4747, at *7 (E.D. Cal. Jan 23, 2009) (court will not "compel [defendant] to conduct discovery in the manner plaintiff prefers").

Plaintiff's reliance on *Kozlowski* is misguided. Unlike Ocwen, which has conducted a reasonable and diligent search of likely files, the responding party in *Kozlowski* did not even search the records where it knew the requested complaints existed. *See* 73 F.R.D. at 74-76. Further, unlike in *Kozlowski*, compelling Ocwen to search unspecified and unascertainable individual loan files for additional communications relating to Section 580b would be cumulative and burdensome, especially because it is not possible to electronically query the comments logs and transaction histories that summarize communications between Ocwen and borrowers, necessitating a file-by-file review. (Neil Decl. ¶ 9.) Ocwen is not required to conduct such a burdensome review where Ocwen has already produced responsive documents and the additional search would likely add no value. *See Chatman*, 2009 U.S. Dist. LEXIS 4747, at *7.

Plaintiff is also not entitled to unredacted copies of documents that Ocwen has already produced, for the sole admitted purpose of identifying potential class members and witnesses. Such identifying information is irrelevant to Rule 23 certification issues. *See, e.g.*, *Oppenheimer Fund v. Sanders*, 437 U.S. 340, 354 n.20 (1978) (class member identities are seldom relevant under the discovery rules); *Palmer v. Stassinos*, No. 5:04-cv-3026 RMW (RS), 2005 U.S. Dist. LEXIS 41270, at *13 (N.D. Cal. May 18, 2005) ("it does not appear that the identities of putative class members are required to enable plaintiffs to file a motion for class certification"); *Dziennik v. Sealift, Inc.*, No. 05-CV-4659 (DLI) (MDG), 2006 U.S. Dist. LEXIS 33011 at *3 (E.D.N.Y. May 23, 2006) ("Courts have ordinarily refused to allow discovery of class members' identities at the pre-certification stage"). Additionally, explained in section I.C above, information that would be revealed by producing unredacted versions of the documents—for example, that

the borrowers referenced in the letters maintained an account with Ocwen—is subject to privacy protections under the GLBA and California Constitution.

Finally, plaintiff complains that in responding to Requests for Production 13 and 14, Ocwen improperly limited its response to communications received since June 25, 2008. This assertion ignores that the scope of her original requests were limited to communications beginning on that date. (*See* Pl.'s Mot. at 18:5-19:21; Pl.'s Ex. 4 at 5:13-19.) Accordingly, no further response is required and plaintiff's motion with respect to Requests for Production 13 and 14 should be denied as moot.

CONCLUSION

For the foregoing reasons, Ocwen respectfully requests that the Court deny plaintiff's motion to compel in its entirety.

Dated: July 14, 2010

BRIAN P. BROOKS
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By: /s/ Elizabeth Lemond McKeen
Elizabeth Lemond McKeen
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OCWEN LOAN SERVICING, LLC

CERTIFICATE OF SERVICE

On July 14, 2010, I served a true and correct copy of the following document:

DEFENDANT OCWEN LOAN SERVICING, LLC'S OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL FURTHER DISCOVERY RESPONSES

☒ by electronically filing and serving same on all parties listed below via the court's CM/ECF system.

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Executed on July 14, 2010, at Newport Beach, California.

/s/ Elizabeth Lemond McKeen
Elizabeth Lemond McKeen